Supreme Court, U.S.
FILED
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(1)

91-1851

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

BUENAVISTA ESMERALDA CO., LTD.;
HIKARI SHOKAI CO., LTD.;
MARUICHI TRADING CO., LTD.;
AIU INSURANCE COMPANY,
Petitioners,
v.
AEROVIAS NACIONALES DE COLOMBIA, S.A.,
doing business as AVIANCA; PAN AMERICAN
WORLD AIRWAYS, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of establishing treaty jurisdiction under Article 28(1) of the Warsaw Convention, is an international air carrier's place of business through which the contract for transportation is made limited to the country in which the air waybills are issued?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioners Buenavista Esmeralda Co. Ltd., a corporation, Hikari Shokai Co., Ltd., a corporation, Maruichi Trading Co., Ltd., a corporation, and AIU Insurance Company, a corporation, and the respondents Aerovias Nacionales De Colombia, S.A., a corporation doing business as Avianca, and Pan American World Airlines, Inc., a corporation.

Petitioners Buenavista Esmeralda Co. Ltd., Hikari Shokai Co., Ltd., and Maruichi Trading Co., Ltd. have no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

Petitioner AIU Insurance company has the following parent corporation: American International Group, Inc.

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BUENAVISTA ESMERALDA CO., LTD.;
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doing business as AVIANCA; PAN AMERICAN
WORLD AIRWAYS, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioners Buenavista Esmeralda Co. Ltd, Hikari Shokai Co., Ltd., Maruichi Trading Co., Ltd. and AIU Insurance Company (collectively, "petitioners") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on February 13, 1992.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, dated February 13, 1992, denying petitioners' petition for rehearing and rejecting petitioners' suggestion for rehearing en banc is not reported. This Order is reproduced in the appendix hereto, pp. 1a, *infra*.

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit, dated December 12, 1991, is not

reported. This Memorandum decision is reproduced in the appendix hereto, pp. 2a, *infra*.

The Judgment of the United States District Court for the Central District of California, entered August 13, 1990, is not reported. This Judgment is reproduced in the appendix hereto, pp. 6a, *infra*.

The Minute Order of the United States District Court for the Central District of California granting respondent Aerovias Nacionales De Colombia, S.A.'s motion to dismiss, entered on September 14, 1988, is not reported. This Minute Order is reproduced in the appendix hereto, pp. 8a, *infra*.

JURISDICTION

This suit was originally filed in the United States District Court for the Central District of California pursuant to the court's jurisdiction under 28 U.S.C. § 1331. The district court granted respondent Aerovias Nacionales De Colombia, S.A.'s motion to dismiss on September 14, 1988, and entered judgment dismissing the case on August 13, 1990.

On petitioners' timely appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment on December 12, 1991. See pp. 2a, *infra*. The Ninth Circuit denied the petitioners' timely petition for rehearing and suggestion for rehearing en banc by Order entered on February 13, 1992. *See* pp. 1a, *infra*.

The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

TREATY INVOLVED

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted* in 49 U.S.C. § 1502 note (1976):

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting

Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

STATEMENT OF THE CASE

Petitioners are the beneficial owners of uncut emeralds ("the cargo") which respondent Aerovias Nacionales De Colombia, S.A., doing business as Avianca ("Avianca"), was to ship from Bogota, Colombia, to Tokyo, Japan, via Los Angeles, California. On or about September 1, 1986, Avianca transported the cargo in three packages from Bogota to Los Angeles along with three corresponding air waybills issued in Bogota. At Los Angeles International Airport, respondent Pan American World Airways, Inc. ("Pan Am") unloaded the cargo from Avianca's aircraft and transferred it to Japan Air Lines, Co., Ltd. ("JAL") for successive on-carriage to Tokyo. Upon receipt of the cargo from the Pan Am ground crew, JAL personnel discovered that the packages were lighter than specified in the air waybills. Following further investigation, it was determined that $180,000.00 in emeralds was missing from the packages. Avianca and Pan Am denied liability for the loss.

At the time of this shipment, Pan Am was acting as Avianca's handling agent for purposes of arranging air transportation of the emeralds from Los Angeles to Tokyo. Acting on behalf of Avianca, Pan Am delivered the cargo to JAL at LAX. JAL accepted the cargo and agreed to transport the goods to Tokyo. These arrangements were made between Pan Am and JAL in Los Angeles.[1]

Avianca filed a motion to dismiss petitioners' complaint pursuant to Article 28 of the Warsaw Convention on the grounds that neither the district court nor any other court in the United States had treaty jurisdiction over this matter because petitioners did not

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[1]The district court found that Pan Am was a "carrier" subject to suit under the terms of the Warsaw Convention and was properly sued in the Central District of California.

satisfy any of the four requirements of Article 28(1) of the Convention. The district court granted Avianca's motion to dismiss on September 13, 1988, ruling that it lacked treaty jurisdiction to hear the case because "the domicile of the carrier, its principal place of business, the country where the contract was formed, and the place of destination of the consignment all lie outside the United States." (*See* appendix, pp. 8a, *infra.*) The district court entered judgment against petitioners and for Avianca on August 13, 1990. Petitioners timely appealed to the Ninth Circuit.

In a Memorandum decision, the United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal and held that Article 28(1) did not confer treaty jurisdiction over Avianca because "the carrier's place of business through which the contract was made" was Bogota, Colombia, where the air waybill was issued and "[n]othing about the tender of cargo from Avianca to JAL altered Avianca's contractual obligations to the plaintiffs or plaintiffs' obligations to Avianca." (*See,* appendix, pp. 2a, *infra.*) By Order dated February 13, 1992, the Ninth Circuit denied petitioners' timely filed petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER FEDERAL COURTS ARE DIVIDED ON WHETHER AN INTERNATIONAL AIR CARRIER'S PLACE OF BUSINESS THROUGH WHICH THE TRANSPORTATION CONTRACT HAS BEEN MADE IS LIMITED TO THE COUNTRY WHERE THE AIR WAY-BILLS ARE ISSUED

All parties agree that petitioners' right to maintain this action in federal court depends on the interpretation of Article 28(1) of the Warsaw Convention. Article 28(1) provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention"), October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted* in 49 U.S.C. § 1502 note (1976). Petitioners' sole basis for treaty jurisdiction in the Central District of California is the language in Article 28(1) which extends treaty jurisdiction to the country where the air carrier "has a place of business through which the contract has been made . . . ."[2]

The determination of whether or not treaty jurisdiction exists on this ground turns on the definition of the term "contract" as used in Article 28(1). On the one hand, if the term is defined

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[2]All parties agree that petitioners have no basis for treaty jurisdiction under Article 28(1) in the United States based on the domicile of Avianca, or its principal place of business, or the place of destination. Each of these places lies outside the United States. Finally, there is no dispute that Avianca had a "place of business" in Los Angeles at all times relevant to the facts of this case as required by Article 28(1).

narrowly to mean only the air waybills themselves, then treaty jurisdiction in the United States does not exist in this case because Avianca issued its waybills in Bogota, Colombia. On the other hand, if the term "contract" in Article 28(1) is defined more broadly to include the full range of agreements between shippers and the carrier or carriers with whom they contract, then treaty jurisdiction is proper in the Central District of California because part of the contract for transportation was entered into in Los Angeles.

Petitioners have found no opinion of this Court interpreting the subject provision of Article 28(1). Several lower courts, however, have considered this language and have reached widely different interpretations of this provision. For example, a number of lower federal courts have adopted the position of the Ninth Circuit in this case that the carrier's "place of business through which the contract has been made" means the place where the air waybill was issued or the passenger ticket purchased. *See e.g., Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406, 410 (2nd Cir. 1982); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 803 (2nd Cir. 1971); *Stanford v. Kuwait Airways Corporation*, 648 F.Supp. 657, 661 (S.D.N.Y. 1986); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F.Supp. 795, 798 (S.D.N.Y. 1985); *cf. Stud v. Trans. Intern. Airlines*, 727 F.2d 880, 882 (9th Cir. 1984) ("the Air Waybill covering [the] shipment indicates that the contract of carriage was made in Canada").

In each of these cases the court based its determination of whether or not treaty jurisdiction existed in the United States on where the air waybill was issued or the passenger ticket purchased. If the waybill was issued in the United States, the court found jurisdiction in this country was proper. If it was issued in a country other than the United States, the court found jurisdiction was not proper and dismissal of the federal action was upheld.

Other federal courts have arrived at a very different interpretation of the critical language in Article 28(1). In these cases the courts did *not* limit their examination of the treaty jurisdiction issue to where the air waybills were issued or the passenger tickets were purchased. Instead, they looked to the totality of the contractual relationships between the shippers and the carrier or

carriers involved in the air transit to determine where jurisdiction was proper. *See e.g., Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1, 2 (2nd Cir. 1988); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 809-10 (2nd Cir. 1966); *Boyar v. Korean Air Lines*, 664 F.Supp. 1481, 1485 (D.D.C. 1987); *cf. Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). In each of these cases, the court undertook a "case-by-case" analysis of the plaintiffs' claims of a contractual connection to the United States and upheld treaty jurisdiction in those cases where such a connection existed.

The facts of *Campbell, Eck* and *Boyar* evidence the complex contractual relationships involved in international air transportation in today's global village. These opinions recognize that modern transportation contracts are not formed at one point in time when the ticket is purchased or where the air waybill is issued. Rather, a factual inquiry is required into all aspects of the making of the transportation contract to determine whether the United States is in any way a place through which the contract was made.

In the case at bar, the contract of transportation by its own terms had many parties, including JAL, but was not completely "made" in Bogota. The contract was made when the tender of the emeralds was made to JAL in Los Angeles, and JAL accepted. Until that time JAL could have rejected the cargo; indeed it would have rejected it if full value and substantially greater freight had not been paid. If that had occurred, the contract would have been between different parties, even though JAL's name appeared on the air waybills.

The rigid interpretation of Article 28(1) in *Stratis, Smith, Stanford* and *Recumar* would have been inappropriate in *Campbell* and *Boyar* given the complex contractual relationships involved in these cases. Similarly, the rigid interpretation of the Ninth Circuit in the present case was inappropriate given the fact that part of the contract of transportation was entered into in Los Angeles.

The broad approach to treaty jurisdiction under *Campbell, Eck* and *Boyar* is consistent with the plain language of the Warsaw

Convention. The Convention does not state that the air waybill is — in and of itself — the contract of transportation. While the Warsaw Convention itself contemplates that the air waybill "shall be *prima facie* evidence of the conclusion of the contract, of the receipt of goods and of the conditions of transportation" [49 U.S.C. § 1502 note Art. 11(1)], other terms and conditions may be included in the "contract of transportation." For example, Article 1(3) contemplates "successive carriage" pursuant to a "series of contracts" and Article 5 provides that a contract of transportation can exist even in the absence of an air waybill. 49 U.S.C. § 1502, note Arts. 1(3), 5(2) and 9. Thus, the conclusion that treaty jurisdiction under the subject language in Article 28(1) is limited to the place where the air waybills are issued is simply not supported by the language of the treaty itself.

In this case, Avianca reserved the right to select who would handle the cargo it accepted for shipment, as evidenced by its own air waybill which allows Avianca to enter into subsequent agreements for successive carriage or handling even after it issues an air waybill. By the same token, under the Warsaw Convention, the owner of the cargo has the right to sue directly those successive carriers with whom Avianca contracts. If Avianca has the right to alter or choose who that successive carrier will be, or, as in the instant case, enter into an agreement for successive carriage *after* the air waybill is given to the shipper, the right of the cargo owner to sue the onward carrier does not arise until Avianca has contracted with the subsequent carrier for that onward transportation.

That is precisely what happened in this case. Without any prior booking or arrangement, the Pan Am representative simply tendered the cargo and the air waybill to JAL at Los Angeles. JAL accepted them. At that point the contract for successive on-carriage from Los Angeles to Tokyo was made. Indeed, had Pan Am tendered the cargo to another carrier, the contract of transportation would have had different parties and JAL would not even be a prospective defendant in the case. Thus, a part of the contract of transportation was made in Los Angeles.

Under the interpretation of Article 28(1) in *Campbell, Eck* and *Boyar*, the above facts evidencing a Los Angeles contract of

transportation would suffice to establish treaty jurisdiction in the United States, at least at the pleading state. Yet under the interpretation of Article 28(1) in *Stratis, Smith, Stanford* and *Recumar* these facts would fail to establish such jurisdiction in the United States simply because Avianca issued the air waybills in a country other than the United States. This Court should grant the present petition to resolve the conflict among the lower federal courts on the interpretation of this important language in Article 28(1).

II.

THE ISSUE RAISED IN THIS APPEAL INVOLVES AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

This case raises the age-old problem of changes in technology out pacing the evolution of the applicable law. In this modern era of transportation, a contract of carriage involves much more than simply issuing an air waybill or purchasing a passenger's ticket. Rather, today's contracts incorporate so-called successive carrier agreements, interline agreements, electronically recorded tariffs, extensive federal and state regulations, and various agency contracts. Basing treaty jurisdiction under the Warsaw Convention on where the air waybill or passenger ticket is issued simply does not comport with either the complex realities of modern air transport or with common sense.

The facts of this case evidence these technological advances. Avianca's shipment of the emeralds involved three air carriers, successive carrier agreements, complex agency relationships and extensive communications between Bogota, Colombia, Los Angeles, California, and Tokyo, Japan. The result was a contract of transportation which was made in part in Bogota and in part in Los Angeles. Establishing treaty jurisdiction on the basis of where the air waybill was issued — as the Ninth Circuit did in this case — simply does not comport with the realities of the complex contractual relationships which modern technology has made possible.

Certainly the drafters of the Warsaw Convention could not have foreseen all of these modern technological developments in the commercial airline industry. Nevertheless, they chose language which allows for an expansive interpretation of treaty jurisdiction under Article 28(1). For example, if the drafters had intended to restrict treaty jurisdiction to the place the air waybill was actually issued, they would have likely used language such as "where" the contract was formed rather than the more expansive "through which the contract was formed." Their use of the more inclusive language signals their intent to be inclusive rather than exclusive with respect to treaty jurisdiction under Article 28(1).

Given the technological advances in the commercial aviation industry over the last decade, and the expected additional advances in the coming years, it is imperative that the rules relating to treaty jurisdiction have the flexibility to meet such advances. Accordingly, this Court should grant this petition to consider whether the provisions of Article 28(1) as presently interpreted by the lower federal courts provide sufficient flexibility as well as guidance on the important issue of treaty jurisdiction under the Warsaw Convention.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully Submitted,

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No. 90-56062

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BUENAVISTA ESMERALDA CO., LTD., a corporation;
HIKARI SHOKAI CO., LTD., a corporation;
MARUICHI TRADING CO., LTD., a corporation;
AIU INSURANCE COMPANY, a corporation,
Plaintiffs-Appellants,

v.

AEROVIAS NACIONALES DE COLOMBIA, S.A.,
a corporation doing business as
AVIANCA; PAN AMERICAN WORLD AIRWAYS, INC.,
Defendants-Appellees.

ORDER

D.C. No. CV-88-4029 WDK (Kx)

FILED FEB 13, 1992
Cathy A. Catterson, Clerk U.S. Court of Appeals

On Appeal From the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted November 4, 1991
Pasadena, California

Before: SNEED, BEEZER and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Beezer and Trott vote to reject the suggestion for rehearing en banc and Judge Sneed recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 90-56062

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUENAVISTA ESMERALDA CO., LTD., a corporation;
HIKARI SHOKAI CO., LTD., a corporation;
MARUICHI TRADING CO., LTD., a corporation;
AIU INSURANCE COMPANY, a corporation,
Plaintiffs-Appellants,

v.

AEROVIAS NACIONALES DE COLOMBIA, S.A.,
a corporation doing business as
AVIANCA; PAN AMERICAN WORLD AIRWAYS, INC.,
Defendants-Appellees.

MEMORANDUM
D.C. No. CV-88-4029 WDK(Kx)

FILED DEC 12, 1991
Cathy A. Catterson, Clerk U.S. Court of Appeals
On Appeal From the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted November 4, 1991**
Pasadena, California
Filed December 12, 1991

Before: SNEED, BEEZER and TROTT, Circuit Judges.

Plaintiffs brought an action for the loss of air cargo transported by defendant Aerovias Nacionales de Colombia, S.A. ("Avianca"). The district court dismissed plaintiffs' complaint against Avianca for lack of jurisdiction and plaintiffs appeal.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

I

On September 1, 1986, Avianca received in Bogota, Colombia a cargo of three boxes of cut emeralds for carriage by air to Tokyo, Japan via Los Angeles, California. Under the terms of the air waybills issued in Bogota, the consignments were to be shipped on Avianca from Bogota to Los Angeles and on Japan Air Lines Co., Ltd. ("JAL") from Los Angeles to Tokyo. Pan American World Airways, Inc. ("Pan Am"), Avianca's cargo handling agent in Los Angeles, was to receive the gemstones from Avianca once they arrived at Los Angeles International Airport ("LAX") and deliver them to JAL.

At some point after Avianca took custody of the jewels, but prior to their receipt by JAL, a portion of the emeralds disappeared. Both Avianca and Pan Am disclaimed responsibility for the loss. On June 30, 1988, plaintiffs brought an action against the two carriers under the Warsaw Convention, and for breach of contract and breach of bailment. The district court dismissed plaintiffs' complaint against Avianca on September 14, 1988 after determining that it lacked jurisdiction under Article 28(1) of the Warsaw Convention. On August 13, 1990, the court entered judgment for Avianca and this appeal followed.

II

The United States and more that 120 other nations are signatories to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, June 27, 1934, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note. The Convention, drafted in 1929, creates internationally uniform rules governing the air carriage of passengers, baggage and cargo. By virtue of its status as a treaty made under the authority of the United States, the Convention is the supreme law of the land, equal in stature and force to the domestic laws of the United States. U.S. Const. art. VI.

Under Article 18 of the Convention, carriers are presumptively liable for the loss of the cargo. Article 28(1) establishes where an action against a carrier for such a loss can be commenced:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Article 28(1) confers treaty jurisdiction over a claim. If treaty jurisdiction under the Convention does not lie in the United States, federal jurisdiction cannot be established. *See Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1, 1 (2d Cir. 1988).

III

Plaintiffs concede that Avianca's domicile and principal place of business are Colombia. Plaintiffs further concede that the place of destination of the lost cargo was Japan. Plaintiffs contend, however, that the United States is a place of business through which the contract of transportation was made. Plaintiffs argue that at the time the air waybills were issued in Bogota, Avianca had no agreement with JAL for carriage of the emeralds from Los Angeles to Tokyo. It was not until Avianca's agent, Pan Am, tendered the cargo to JAL at LAX, plaintiffs argue, that the contract of transportation for successive on-carriage from Los Angeles to Tokyo was made. Consequently, plaintiffs conclude, Los Angeles is a place of business through which part of the contract of transportation was made.

IV

For purposes of Article 28(1) of the Convention, the "carrier's place of business through which the contract was made" has generally been interpreted to mean the place where the air waybill was issued. *See Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 803 (2d Cir. 1971); *Stud v. Trans Intern. Airlines*, 727 F.2d 880, 882 (9th Cir. 1984) ("the Air Waybill covering [the] shipment indicates that the contract of carriage was made in

Canada.") This interpretation is supported by Article 11(1) of the Convention which expressly provides that "[t]he air waybill shall be *prima facie* evidence of the conclusion of the contract . . ., and of the conditions of transportation."

In this case, the air waybills for the lost emeralds were issued in Bogota, Colombia. Those air waybills clearly state that the consignments were to be shipped on Avianca from Bogota to Los Angeles and on JAL from Los Angeles to Tokyo. Nothing about the tender of cargo from Avianca to JAL altered Avianca's contractual obligations to the plaintiffs or plaintiffs' obligations to Avianca. Consequently, Los Angeles was not a place of business through which a contract of transportation between Avianca and the plaintiffs was made.

Plaintiffs rely on *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966) for the proposition that Article 28(1) establishes treaty jurisdiction over their claims. Plaintiffs' reliance on *Eck* is misplaced. In *Eck*, the court simply held that jurisdiction was appropriate over a claim involving a passenger who purchased a ticket in the United States from an authorized agent of a foreign carrier. That decision does not address jurisdiction over a claim involving air waybills issued in a foreign country.

V

The judgment of the district court is AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

MARCH 19, 1992

by: Sylvia McAlister
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BUENAVISTA ESMERALDA CO. LTD., a corporation;
HIKARI SHOKAI CO., LTD., a corporation;
MARUICHI TRADING CO., LTD., a corporation;
AIU INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

AERO VIAS NACIONALES DE COLOMBIA, S.A., a corporation doing business as AVIANCA WORLD AIRWAYS, INC., a corporation,

Defendants.

JUDGMENT

ENTERED
CLERK, U.S. DISTRICT COURT
AUG 13 1990
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV 88-4029 WDK(kx)

Filed AUG 9 1990

Clerk U.S. District Court
Central District of California
By _____ Deputy

Pursuant to the request of plaintiffs, Fed. R. Civ. P. 54(b), the Court finds as follows:

1. There is no just reason for delay of appeal;

2. That the Court's Order of September 13, 1988, terminates the litigation between plaintiffs and defendant Aero Via Nacionales de Colombia, S.A. dba AVIANCA;

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

3. That the issue of whether jurisdiction over AVIANCA exists under the Warsaw Convention is not similar to the issues still pending before this court between the remaining litigants; and

4. That the jurisdiction issue decided by this Court's order of September 13, 1988, will not be made moot by future developments in this action.

IT IS THEREFORE ORDERED

That final judgment be entered against plaintiffs and for defendant Aero Via Nacionales de Colombia, S.A., for the reasons set forth in this Court's order of September 13, 1988.

IT IS SO ORDERED.

William D. Keller, Judge
United States District Court

DATED: August 9, 1990.

Case No. CV 88-4029 -WDK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Date 9/13/88

Title *Buenavista Esmeralda Co. Ltd., et al. v. Aero Vias etal.*

DOCKET ENTRY

This Constitutes Notice of Entry
as Required by FRCP, Rule 77(d).
Entered
Clerk, U.S. District Court
SEP 14 1988
Central District of California

PRESENT:

HON. WILLIAM D. KELLER, JUDGE

Sara Wong	---
Deputy Clerk	Court Reporter

Attys Present for Plaintiffs:	Attys Present for Defendants:
None Present	None Present

PROCEEDINGS:

This matter is before the Court on the motion of defendant Aero Vias Nacionales de Colombia, S.A. to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). On the basis of the submitted materials, this Court hereby Orders that defendant's motion is GRANTED.

Jurisdiction over this action is governed by Article 28(1) of the Warsaw Convention, 49 U.S.C. § 1502 (1976). Under the terms of Article 28(1), the courts of the United States have no jurisdiction over this case. The domicile of the carrier, its principal place of business, the country where the contract was formed, and the place of destination of the consignment all lie outside of the United States. Los Angeles was no more than an "agreed

stopping place" within the meaning of Article 1. *See Lee v. China Airlines Ltd.*, 669 F. Supp. 979, 981 (C.D. Cal. 1987).

I hereby certify that this document was served by First Class Mail, postage prepaid to all counsel (or parties) at their respective most recent address of record in this action on this date.

DATED: 9-13-88

Sara Wong
Deputy Clerk

Initials of Deputy Clerk SW

(2)

No. 91-1851

SUPREME COURT, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

BUENAVISTA ESMERALDA CO. LTD.,
a corporation; HIKARI SHOKAI CO., LTD.,
a corporation; MARUICHI TRADING CO., LTD.,
a corporation; AIU INSURANCE COMPANY, a corporation,
Petitioners,
vs.
AEROVIAS NACIONALES DE COLOMBIA, S.A.,
a corporation doing business as
AVIANCA; PAN AMERICAN WORLD AIRWAYS, INC.,
a corporation,
Defendants,
AEROVIAS NACIONALES DE COLOMBIA,
S.A., a corporation doing
business as AVIANCA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the country where the air waybill providing for international transportation of cargo is issued is the "place of business through which the contract has been made" under Article 28(1) of the Warsaw Convention.[1]

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[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1976).

RULE 29.1 LIST

Aerovias Nacionales de Colombia, S.A. has no parent companies, and the following non-wholly owned subsidiaries:

1. Aerocomercio Internal Ltda.;
2. Corporacion de Viajes Ltda.;
3. Helicopteros Nacionales de Colombia, S.A.;
4. Sociedad Aeronautica de Medellin Consolidada, S.A.;
5. Sociedad Productora y Comerc. de Alimentos Ltda.

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No. 91-1851

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OCTOBER TERM, 1991

BUENAVISTA ESMERALDA CO. LTD.,
a corporation; HIKARI SHOKAI CO., LTD.,
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Aerovias Nacionales de Colombia, S.A. (hereinafter "Avianca") respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Ninth Circuit affirming the District

Court's dismissal of the action pursuant to Article 28(1) of the Warsaw Convention.

The memorandum of the Court of Appeals and the order of the District Court, respectively, are not officially reported. The memorandum and the order are printed in the Appendix to the Petition.[2]

STATEMENT OF THE CASE

1. The Nature of the Case.

Petitioners bring this action for damages arising out of the alleged loss of cargo transported by respondent Avianca and by Japan Air Lines Co., Ltd. (hereinafter "JAL"). On or about September 1, 1986, the consignments, consisting of three small packages of emeralds, were transported from Bogota, Colombia to Tokyo, Japan via Los Angeles, California. The consignments were transported pursuant to air waybills which were issued in Colombia, and which provided for transportation from Bogota to Los Angeles on Avianca, and from Los Angeles to Tokyo on JAL.

Petitioners allege that portions of the consignments were lost during this transportation, and seek damages of $181,625.08.

2. The Course of Proceedings.

Petitioners' action for damages under the Warsaw Convention, and for breach of contract and for breach of bailment, was filed in the United States District Court for the Central District of California on June 30, 1988. On July 21, 1988, Avianca filed a motion to dismiss petitioners' complaint on the grounds that pursuant to Article 28 of the Warsaw Convention,[3] no court in the

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[2]References to the Appendix to the Petition appear as "Pet. A- ".

[3]"An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." 49 Stat. 3020.

United States has jurisdiction over this action. Petitioners opposed the motion asserting, *inter alia*, that the contract for transportation was formed in the United States, not Colombia, thereby satisfying the requirements for jurisdiction under Article 28. The District Court granted Avianca's motion on September 14, 1988, and on August 13, 1990, entered judgment in its favor on the grounds that the rights and liabilities of the parties are governed by the Warsaw Convention, and that, pursuant to Article 28(1) of the Warsaw Convention, no court in the United States has jurisdiction over this action.

Petitioners timely filed a notice of appeal on August 27, 1990. On December 12, 1991, the Court of Appeals for the Ninth Circuit affirmed the dismissal of the District Court, and entered judgment in favor of respondent. On December 30, 1991, petitioners filed an *untimely* petition for rehearing and suggested that the court rehear the matter en banc. By order dated February 13, 1992, the Court of Appeals denied the petition for rehearing, and rejected the suggestion for rehearing en banc. On May 13, 1992, petitioners *untimely* filed this petition for writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

There are no reasons for the Court to consider this petition for writ of certiorari, and the petition sets forth none. This petition should be denied because it was untimely filed, because the lower courts have uniformly decided the issue consistently with this case, and because it does not involve an important question of federal law which must be settled by the Court.

1. The Petition for Writ of Certiorari is Untimely.

The Court of Appeals for the Ninth Circuit entered judgment in favor of respondent on December 12, 1991. Pet. A-2a. A petition for writ of certiorari seeking review of the December 12, 1991 judgment must have been filed within ninety days thereafter, or by March 11, 1992. 28 U.S.C. § 2101(c)(1992); Sup. Ct. R. 13.1; *Missouri v. Jenkins*, 495 U.S. 33 (1990) ("This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the

State's petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition." *Id.* at 45). The petition for writ of certiorari was not filed until May 13, 1992, and therefore, it was untimely and must be denied.

Although the *timely* filing of a petition for rehearing in the Court of Appeals can toll the ninety day filing requirement of 28 U.S.C. section 2101, such a timely petition was not filed in this case. ("[I]f a petition for rehearing is *timely* filed . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment." Sup. Ct. R. 13.4 (emphasis added)). A petition for rehearing must be filed within fourteen days after entry of the judgment, or in this case, by December 26, 1991. Fed. R. App. P. 40(a). Petitioners' petition for rehearing was not filed with the Court of Appeals until December 30, 1991, or four days late. Appendix 1a. Inasmuch as the petition for rehearing was untimely filed, it did not toll the ninety day filing requirement for the instant petition for writ of certiorari. *See* Sup. Ct. R. 13.4.

Despite the untimeliness of the petition for rehearing, the Court of Appeals considered and denied same on February 13, 1992 (Pet. A-1a.), nearly one month prior to the expiration of the ninety day filing requirement of 28 U.S.C. section 2101. Petitioners now have attempted to use the date that the untimely petition for rehearing was denied to extend the date when their petition for writ of certiorari had to be filed. Such a tactic has been rejected by this Court. *Cf. Allegrucci v. United States*, 372 U.S. 954 (1963)(An attempt to recapture timeliness of a petition for writ of certiorari cannot be accomplished by filing an untimely petition for rehearing in the Court of Appeals, even if the Court of Appeals considers the untimely petition for rehearing.)

Petitioners' untimely filing of the petition for rehearing did not toll the filing requirements for the petition for writ of certiorari. For these reasons, this petition for writ of certiorari is untimely and must be denied.

2. There are no Conflicts in the Courts Below.

The decision of the court below is not in conflict with any other federal court decisions regarding the interpretation of the "place of business through which the contract has been made" under Article 28(1) of the Warsaw Convention. Petitioners incorrectly contend that there is a split of authority between the lower courts with respect to this issue. To support this position, petitioners cite, *inter alia*, four Second Circuit opinions, and two District Court opinions from within that circuit,[4] and claim that there are two different analyses with respect to determining where the contract of transportation is made. If this was the case, this would constitute a split of authority wholly within the Second Circuit; a situation which easily could be resolved by that court.

In fact, a review of all decisions regarding jurisdiction under Article 28 reveals that the claimed conflict simply does not exist. As in the case here, when the payment for transportation and the issuance of an air waybill or passenger ticket has taken place in the same country, the courts uniformly have held that that country is the place where the contract is made. *See, e.g., Petrire v. Spantax, S.A.*, 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 845 (1985) (ticket purchased and issued in Spain; case dismissed); *In re Alleged Food Poisoning Incident, March, 1984*, 770 F.2d 3 (2d Cir. 1985) (ticket purchased and issued in Saudi Arabia; case dismissed); *Gayda v. LOT Polish Airlines*, 702 F.2d 424 (2d Cir. 1983) (situs of the contract in Poland; case dismissed); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971) (ticket purchased in Canada; case dismissed); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966) (ticket purchased and issued in the United States; case not dismissed); *Lee v. China Airlines, Ltd.*, 669 F. Supp. 979 (C.D. Cal. 1987) (ticket purchased and issued in Hong Kong; case

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[4]*Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1 (2d Cir. 1988); *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657 (S.D.N.Y. 1986); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795 (S.D.N.Y. 1985).

dismissed); *Boyar v. Korean Air Lines*, 664 F. Supp. 1481 (D.D.C. 1987) (tickets purchased and issued in Hong Kong and Korea; cases dismissed; ticket purchased in the United States; case not dismissed); *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657 (S.D.N.Y. 1986) (tickets purchased and issued in Yemen; cases dismissed); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795 (S.D.N.Y. 1985) (air waybills issued in Switzerland and India; case dismissed); *P.T. Airfast Services, Indonesia v. Superior Court*, 139 Cal.App.3d 162, 188 Cal.Rptr. 628 (1983) (transportation contract entered into in Indonesia; case dismissed). *Cf. Campbell v. Air Jamaica, Ltd.*, 863 F.2d 1 (2d Cir. 1988) (case remanded for determination as to where ticket was issued).

There is no split of authority between the lower courts with respect to this issue, and there is no conflict for this Court to resolve. Accordingly, this petition should be denied.

3. This Appeal Does not Involve an Important Question of Federal Law Which Must be Settled by This Court.

A petition for writ of certiorari regarding the application of the jurisdictional requirements of Article 28 of the Warsaw Convention does not involve an important question of federal law which must be resolved by this Court. In fact, this Court already has denied a petition pertaining to the review of this jurisdictional issue. *Petrire v. Spantax, S.A.*, 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

This case requires the routine application of the four situs requirements for jurisdiction under Article 28 to very simple facts. The only situs requirement at issue in this case pertains to the determination of where the contract for transportation was made. The Court of Appeals for the Ninth Circuit correctly held that this "has generally been interpreted to mean the place where the air waybill was issued," and affirmed the District Court's dismissal of the action because the subject air waybills were issued, and the transportation was prepaid, in Bogota, Colombia. Pet. A-4a.

Evidenced by the uniformity with which this issue has been decided by the lower courts, this is not an issue which must be

resolved by this Court. Accordingly, this petition should be denied.

CONCLUSION

For these reasons, Aerovias Nacionales de Colombia, S.A. respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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APPENDIX A

TO: PANEL AND ALL ACTIVE JUDGES

RE: PETITION FOR REHEARING AND/OR
SUGGESTION FOR REHEARING EN BANC

SHORT TITLE: Buenavista Esmeralda v. Aerovias Nacionales
DOCKET NO.(s): 90-56062

(x) Memorandum ( ) Opinon ( ) Order of
12/12/91 _____
(date)

Panel Judges: Honorable Joseph T. Sneed
Honorable Robert R. Beezer
Honorable Stephen S. Trott

STAMP

Filed December 30, 1991
Cathy A. Gatterson, Clerk
U.S. Court of Appeals